

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JAMES RAY)	
Claimant)	
V.)	
)	Docket No. 1,062,004
BLUE RIVER MAINTENANCE, LLC)	
Respondent)	
AND)	
)	
AUTO OWNERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requested review of the August 12, 2014, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on December 2, 2014.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Michael T. Halloran, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The parties stipulated at oral argument to the Board that claimant's average weekly wage, exclusive of the disputed rent claim, is \$201.25, resulting in a weekly compensation rate of \$134.17. Additionally, claimant has withdrawn his claim for unauthorized medical compensation as the Award of the ALJ allows unauthorized medical compensation up to \$500.00, less any previously reimbursed unauthorized medical paid to claimant. That decision of the ALJ is herein adopted by the Board. The parties further stipulated the claim for the inclusion of claimant's rent, if allowed, has a monthly value of \$437.50.

ISSUES

The parties agreed claimant met with personal injury by accident on July 23, 2012. The ALJ found no record of claimant seeking medical treatment for any problems related to his left shoulder prior to July 23, 2012. The ALJ concluded claimant's permanent impairment and disability from his work accident is 10 percent to the left shoulder. The ALJ

considered the testimony of Dr. Zimmerman, but felt it was insufficient to refute the testimony of Dr. Jones, the treating physician. The ALJ also concluded claimant's average weekly wage, found to be \$201.18, should not include the value of the rent on his apartment. The correct weekly compensation rate is, therefore, \$134.17. Claimant was found to be entitled to future medical treatment to include pain management and medication management. Respondent and its insurance carrier were ordered to pay all authorized medical expenses related to treatment of the claimant's injuries subject to the Medical Fee Schedule. All known medical expenses to date, totaling \$27,288.50, have been paid.

Claimant appealed arguing the ALJ erred in the average weekly wage calculation by not including the value of claimant's monthly rent. Claimant contends the value of the rent should be considered as additional compensation when calculating his average weekly wage. Claimant contends his average weekly wage is \$304.75, and that he is entitled to 43 weeks of temporary total disability compensation at \$203.18 per week. Claimant argues he is entitled to a 33 percent impairment to the left shoulder, taking into consideration Dr. Zimmerman's opinion, and future medical should be left open as he will likely require surgical repair in the future.

Respondent, relying on its submission brief to the ALJ, contends the Award should be affirmed with an average weekly wage of \$201.25, and a 10 percent functional impairment to the left shoulder, but reversed in regard to the right to future medical treatment. Respondent argues claimant's agreement with the prior owner regarding the provided rental unit did not bind respondent when it took over management of the complex. The new agreement between claimant and respondent was for claimant to be paid \$15 an hour for assignments at the direction of respondent. There was no agreement to provide claimant's apartment unit rent free. Claimant admits he has nothing in writing with respondent stating his rent would be paid in exchange for the work. Respondent contends claimant needed reverse shoulder arthropathy before the accident, and the opinions of Dr. Zimmerman and Dr. Prostic do not overcome the presumption set forth in K.S.A. 44-510h(e) entitling claimant to future medical treatment.

The issues on appeal are:

1. What is claimant's average weekly wage?
2. Based upon the average weekly wage, is claimant entitled to additional temporary total disability compensation?
3. What is the nature and extent of claimant's injuries and disability?
4. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant worked as a maintenance man for INK Properties (INK) at the Englewood Apartments. With INK claimant's compensation package included the right to an apartment, rent free. Claimant's compensation agreement with INK was in writing. Claimant testified the rent for his two bedroom apartment was \$425 a month.¹ Claimant performed general maintenance, got apartments ready, installed new appliances, and took care of the apartment complex area by picking up trash and making sure it got into the dumpster. These tasks involved claimant lifting heavy items. He did not have assistance with these job duties. Claimant had no work restrictions at that time. Claimant had been working for INK since 2008 as a 24 hour maintenance worker for the apartment complex and four other houses.

On June 1, 2012, with the apartment complex in bankruptcy, and at the instruction of the bankruptcy trustee, CJ Real Estate (CJ) took over the management responsibilities of the complex. CJ then hired Blue River Maintenance, LLC (respondent) to perform maintenance work for the apartments. Claimant was retained by respondent as a part-time maintenance worker performing limited duties.

Claimant testified that in addition to working for respondent, he worked as a full-time sales associate for Home Depot. Part of his job duties at Home Depot involved lifting things and putting things on shelves. He had been working for Home Depot since 2008 and continued to do so until December 11, 2012. At the time of the regular hearing, claimant was not working due to his shoulder pain.

James Jones owns Blue River Maintenance, LLC, Citywide Overhead Door, CJ Real Estate and Blue River Capital Holdings. He keeps these businesses separate and has two offices in Blue Springs, Missouri. He has been in business as Blue River Maintenance, LLC, for 15 years. Blue River was claimant's employer on July 23, 2012. Claimant was hired to work at the company's Englewood property.

Mr. Jones testified his company, CJ, was brought in to manage the Englewood Property after the former owners filed bankruptcy. Mr. Jones testified his company was to maintain the property until it was sold. CJ retained Blue River to handle maintenance. Mr. Jones testified claimant was an existing employee of the prior company and he was kept on to do some light duty work, such as unclogging drains and tasks of that variety, upon request only and because claimant was on site and had knowledge of the property and the bankruptcy trustee wanted to keep things going. Blue River had its own crews for any major work. Mr. Jones didn't know what claimant's prior agreement was, but claimant was not kept on under that agreement because Blue River only enters into simple employment

¹ At the preliminary hearing, claimant stated the rent value was \$530.00 per month. However, the parties stipulated to a monthly value of \$437.50 at the oral argument to the Board.

agreements for hourly rates. Mr. Jones testified the agreement with claimant was for an hourly rate every week of \$15 to perform work as directed. Claimant was not considered full-time and he was not paid any fringe benefits. He did not have a set number of hours he was to work.

Mr. Jones denied ever telling claimant his rent would be paid for by Blue River. Mr. Jones testified there were times claimant turned in hours for work that was not authorized and although claimant was paid for the extra hours, he was told on two occasions to not perform unauthorized work. Mr. Jones testified claimant had to be talked to about performing extra work that was not assigned to him. This was because they wanted to keep track of all the work performed as the bankruptcy trustee would reimburse the company for the work completed in maintaining the property.

At the preliminary hearing, claimant testified he made \$20 an hour working for respondent and averaged 15 hours a week. He testified he was averaging more hours at the first of 2012 before Englewood Apartments went into bankruptcy. Respondent took over INK two months before the accident. Claimant's work hours depended on the job, but he claimed he was getting about 25 to 30 hours a week working for respondent.

At the time of the regular hearing, claimant testified that, before the accident, he was making \$20 an hour and, at the time of the accident, he was making \$15 an hour. His rate of pay changed when INK filed for bankruptcy and the bankruptcy trustee hired respondent to take over the maintenance of the property. Claimant then became a part-time employee of respondent.

Claimant spoke with Jim Jones about the change in his rate of pay, as he was under the impression he would be performing the same duties as before. He testified Mr. Jones told him he would be paid \$15 an hour, plus rent. Claimant testified he was never told his rent was not part of his wages. Claimant was told by Mr. Jones that he was to perform only work that was assigned to him, he was not to perform any of his former work tasks and he was to report the hours he did work. The issue of claimant's rent came up when claimant spoke with a Jackie Bills an employee of respondent about his rent and he mentioned his contract. He never told Ms. Bills he would pay the rent.

Claimant believed his rent was included in his wages because he began taking care of homes and everything else after respondent took over. Mr. Jones disputes claimant's description of his work for respondent. Claimant testified that after he reported his accident and injury he was told he going to have to start paying rent. Claimant believes he was being sued for back rent because he was injured. Blue River sued claimant for back rent from January 2012 through July 2012. Claimant testified the suit came after his reported his shoulder injury.

Claimant stopped living on property in September 2012 when he was evicted. The lawsuit regarding the back rent was settled when claimant moved out and Blue River waived the issue of back rent.

Mr. Jones testified he was aware of the eviction action against claimant, but he did not know any of the details. He indicated when he met with claimant and informed him of what he would be paid, claimant never brought up the topic of rent or living in the apartment rent free.

On July 23, 2012, while claimant was lifting a dresser into a 7 foot tall dumpster, his knee buckled and he fell backwards with the dresser falling toward him. He turned to keep the dresser from hitting him, but it hit him in the left shoulder. He heard a pop and felt immediate pain in his shoulder. He testified it felt like something tore inside. Claimant was not able to continue work that day. The accident took place around 6:00 a.m.

The next morning, claimant called respondent after he was unable to move his left arm. He was instructed to go to Tallgrass Immediate Care and Family Medicine. On July 25, 2012, claimant went to Tallgrass with left upper arm pain at an 8 on a scale of 1-10. He described the pain as burning, piercing and sharp. Claimant reported trouble sleeping due to the pain, along with numbness, swelling, tingling in the arms, tenderness and weakness. Claimant was examined by Leon Herring, PA-C, under the supervision of Kenneth Gimple, M.D., displaying decreased strength in the left shoulder. There was no evidence of fracture, dislocation or destructive lesion of the left shoulder. The subacromial space was narrowed with migration of the humeral head superiorly, the glenohumeral joint demonstrated degenerative changes. There were no soft tissue calcifications. Claimant was found to have left rotator cuff arthropathy and an MRI was ordered. Claimant did not return to work.

Claimant met with Brett E. Wallace, M.D., on August 13, 2012. Claimant reported the accident and resulting left shoulder and left arm pain, with numbness and shaking in his hand. He denied any prior left shoulder pain. Dr. Wallace noted claimant had been in a sling since the injury. Claimant was examined and found to have all the signs and symptoms of chronic rotator cuff deficient shoulder with developing mild secondary rotator cuff arthropathy. Dr. Wallace was less sure about the hand numbness, noting the Tinel's was not particularly positive and wondered if claimant may have had a brachial plexus stretch. Another cause of hand numbness can be chronic elbow flexion in the sling. Dr. Wallace discontinued the sling and ordered an EMG and nerve conduction velocity. He assigned continued limited duty with no pushing, pulling or lifting with the left arm. In a letter dated August 13, 2012, Dr. Wallace opined the prevailing cause of claimant's underlying rotator cuff deficiency and arthropathy is preexisting.

Claimant met with Dr. Wallace again on September 10, 2012, at which time it was determined claimant's EMG was consistent with left carpal tunnel syndrome. Claimant denied any prior numbness or tingling in his left fingers. Since the accident, claimant has

gained a little bit of movement, but no strength. Dr. Wallace offered surgery for the carpal tunnel. He was not sure there was much he could do to improve the shoulder. He could not relate all of claimant's complaints to the injury. Claimant testified he did not want to see Dr. Wallace again as he was very rude and claimant did not feel comfortable with him. Claimant testified he would like to get his shoulder fixed and would go to anyone but Dr. Wallace.

At the request of his attorney, claimant met with orthopedic surgeon Edward J. Prostic, M.D., on October 1, 2012, with complaints of severe pain in the front of his left shoulder, an inability to lie on his left side, difficulty reaching above shoulder level, behind his neck and behind his back and with clicking, popping and weakness. Dr. Prostic examined claimant and found he most likely sustained additional tearing of the rotator cuff, and now an uncompensated shoulder. The MRI of the left shoulder from Stormont-Vail Health displayed a large tear of the rotator cuff with preexisting osteoarthritis of the acromioclavicular joint and of the glenohumeral joint. Dr. Prostic noted the accident caused "additional tearing", which indicated a partial tear preexisted the accident.² He suggested arthroscopic debridement and attempted rotator cuff tear repair, with eventual reverse total shoulder arthroplasty. Dr. Prostic opined the work-related accident of July 23, 2012, is the prevailing factor in causing the injury, medical condition and need for medical treatment.

At respondent's request claimant met with board certified orthopedic surgeon Lowrey Jones Jr., M.D., on January 17, 2013. Claimant's complaint was left shoulder pain. Dr. Jones noted upon examination of the right shoulder, claimant had a well-healed large anterior scar. Range of motion was good, but slightly limited in flexion and abduction. Strength against resistance was good and he had mild crepitus.

In examining the left shoulder, Dr. Jones testified claimant's strength was extremely poor. The left arm showed severe atrophy posteriorly along the scapula and claimant was not able to actively lift overhead. Claimant was not able to hold his arm well when placed overhead, his passive range of motion was painful and he had considerable crepitus. A neurologic exam showed severe atrophy in the infraspinatus and areas of the supraspinatus. Claimant had deltoid atrophy and tingling along the lower portion of his upper extremity, which indicated the muscle had not been used for a long time. There was some concern about neurologic injury. Claimant also had a mild leg [sic] positive Tinel's and Phalen's exam. Claimant could only lift about 45 degrees, which meant he was doing all of his function with his deltoid and he essentially had no rotator cuff function.³

² Prostic Depo. at 15.

³ Jones Depo. at 7-8.

An MRI of the left shoulder showed a massive rotator cuff tear and increased uptake of the proximal humerus which was elevated underneath the acromion consistent with rotator cuff arthropathy. Claimant also showed considerable labral degenerative changes and the biceps tendon appeared to be ruptured.

Dr. Jones found claimant had a very large left rotator cuff tear and elevation of the humerus under the acromion with changes consistent with, at least early, if not advanced rotator cuff arthropathy. Dr. Jones reviewed the MRI and determined claimant had a very chronic disease process with a portion of the rotator cuff tear. The ball of the shoulder was elevated up underneath the bony acromion and through the rotator cuff which only happens with chronic disease, and not with an acute injury.⁴

Dr. Jones opined as a direct result of the injury sustained on July 23, 2012, claimant has significantly aggravated or accelerated an underlying disease process to the left shoulder. He opined claimant likely had a rotator cuff tear that is significantly worse at this point. He noted claimant had been doing two jobs previously without difficulty and now he cannot lift his left upper extremity and he has significant atrophy, which raises a concern of neurologic injury to the axillary nerve and/or suprascapular nerve.

Dr. Jones opined treatment options included attempting to repair the rotator cuff, which has a high failure rate and, if successful, may leave claimant with significant arthritic pain, or a reverse total shoulder which would limit claimant's ability to do any lifting activity at his young age. Claimant understood his only option of returning to labor activity would be to have the rotator cuff repair.

Dr. Jones opined the prevailing cause for the need for treatment of the massive rotator cuff tear is the July 23, 2012, injury. He went on to opine claimant has preexisting degenerative changes and likely a previous smaller rotator cuff tear. He noted a reverse total shoulder is required now or at a later date, and the prevailing cause for the need for that treatment is the preexisting degenerative arthrosis.

An EMG was recommended to provide information regarding the axillary nerve and suprascapular nerve. If the nerves were normal an arthroscopy and open rotator cuff repair could be attempted, and if that fails, claimant's only option would be a reverse total shoulder replacement. Claimant was not at maximum medical improvement. Dr. Jones restricted claimant from any repetitive reaching, pushing and pulling above chest level on the left side, and no lifting over 10 pounds.

On March 15, 2013, Dr. Jones performed a left shoulder arthroscopy with extensive debridement of labrum, the undersurface of the rotator cuff area, and the chondroplasty of the glenoid; and a arthroscopic primary repair of the posterior rotator cuff.

⁴ *Id.* at 8.

Dr. Jones testified claimant had significant arthritic change or loss of cartilage to the glenoid. He felt that it was Grade 1 to Grade 2 as the glenoid was diffusely worn. The preoperative diagnosis was left shoulder massive rotator cuff tear, left shoulder impingement, left shoulder degenerative changes, and infraspinatus atrophy. The postoperative diagnoses was left shoulder massive rotator cuff tear with no anterior cuff present, extensive cuff tear arthropathy superiorly, acute tear of the posterior rotator cuff, chronic labral degenerative tear and complete biceps tendon rupture.

Claimant attended seven physical therapy sessions, cancelled one session and didn't show for two sessions from May 15, 2013 to June 5, 2013. As of claimant's May 31, 2013, therapy session, claimant no longer held his job with Home Depot because he missed too much work due to medical reasons. Claimant reported his shoulder improved after surgery but his pain level stayed constant at a 5 out of 10. He reported sharp pain in the left shoulder blade area and anterior left shoulder with general left shoulder soreness and aching in the lateral left shoulder to the upper arm. He also had severe stabbing pain with external rotation and horizontal abduction movements. At this time, claimant was unable to perform previous work duties of reaching, lifting, pushing, pulling and performing maintenance activities. Claimant was to continue with therapy three times a week for four to six weeks.

On March 21, 2013, six days post-surgery, claimant's pain was satisfactory. He understood that his very large left rotator cuff tear could not be completely repaired. On April 11, 2013, claimant complained of discomfort in the posterior upper back and scapula, and difficulty sleeping. Claimant was using an immobilizer at this time. By May 9, 2013, claimant was using pulleys. He had a concern about a mass under his left arm that would get bigger and smaller.

Claimant returned to Dr. Jones on June 4, 2013, for a 13 week post-operative check of the left shoulder. Claimant reported doing well, his motion was good and his strength was much better. Claimant had full range of motion in his left elbow and hand and had minimal swelling in his left shoulder. Dr. Jones attempted to investigate a mass claimant complained about, but was unable to feel it and found no axillary nodes. Dr. Jones determined claimant was status post left shoulder arthroscopy with rotator cuff repair. His treatment plan was to begin passive range of motion, proceeding cautiously as there was a high risk of failure. Claimant was doing remarkably well considering the size of the tear and limited repair. Dr. Jones recommended claimant not return to work that requires lifting. Claimant was to begin formal therapy. Dr. Jones agreed to monitor the mass, even though he did not feel it, and opined it could be cystic tissue rather than a lymph node. Claimant understood his only other option was a reverse total shoulder replacement.

Claimant was allowed to return to work with permanent work restrictions including no overhead work with the left arm, no repetitive reaching, pushing or pulling with the left arm, no reaching above the shoulder on the left side and no lifting over 5 pounds using the

left upper extremity. Claimant was found to be at maximum medical improvement and told to return PRN.

In a report dated June 20, 2013, Dr. Jones opined, based on the *AMA Guides*, 4th edition, claimant had a 40 percent permanent partial impairment to the left shoulder, with 30 percent of the rating being due to preexisting conditions and injuries. This left claimant with a 10 percent permanent partial impairment to the left shoulder from the July 23, 2012, accident. He opined the advanced degeneration and a significant portion of the massive rotator cuff tear was preexisting. The injury resulted in further reaming the weakness associated with the rotator cuff, leading to the resulting surgical treatment. Dr. Jones did not feel the injury was the prevailing cause for claimant's arthrosis or the need for reverse total shoulder replacement. He felt the need for future surgery was the degenerative disease and the rotator cuff arthropathy that preexisted the injury.

Dr. Jones opined the lifting injury on July 23, 2012, aggravated claimant's preexisting larger rotator cuff tear. He indicated the aggravation was not significant as surgery was successful in putting claimant's functionality back to what it was. This was a change in opinion from his report after he was able to operate on claimant and assess the actual objective portion of the rotator cuff and note what was actually torn off.⁵ He testified the change in his opinion was due to the fact that he was able to see claimant's shoulder arthroscopically allowing him to analyze objective findings of claimant's condition.⁶

Dr. Jones testified he found it amazing claimant didn't report any symptoms with his left shoulder before the accident, given the preexisting damage in the shoulder. He opined claimant must have been doing most of his lifting with his right arm. Dr. Jones disagreed with the statement that because claimant was strong enough to keep working through his pain he didn't have abnormal function. It is his opinion it is impossible to have normal strength with the preexistent tear and rotator cuff arthropathy claimant displayed. He also testified that this does not mean claimant couldn't function or do his job, but it wouldn't have been at normal strength.

At the request of his attorney, claimant met with board certified independent medical examiner Daniel Zimmerman, M.D., on July 2, 2013, for an examination. Claimant reported continued "total pain" in the left shoulder, and an inability to lift using his left arm because of pain and discomfort. Claimant also reported decreased range of motion in the left shoulder, and an inability to lay on his left side due to pain and discomfort of the left shoulder. Claimant also reported numbness and tingling in his left hand and a numbing sensation over the left biceps, with that area of his left arm feeling like it is asleep at all times.

⁵ *Id.* at 38-39.

⁶ *Id.* at 56-57.

Dr. Zimmerman noted claimant kept his left arm immobilized when removing his shirt for examination. Claimant had no pain or discomfort in either shoulder with strength testing. He had decreased forward flexion in the left shoulder. On palpation of the left shoulder, claimant had pain over the acromioclavicular joint, glenohumeral articulation, supraspinatus nerve and the bicipital tendon. There was no injury to the scapula, neck, head or back.

X-rays showed marked degenerative osteoarthritic changes throughout the glenohumeral joint and severe degenerative changes involving the AC joint. There was no acute fracture or dislocation. The August 8, 2012, MRI of the shoulder revealed a full thickness chronic rotator cuff tear. Both the supraspinatus and infraspinatus tendons demonstrated fatty atrophy. The tendons were not well seen and retracted at least to the level of the glenoid. The subscapularis tendon was disrupted. Dr. Zimmerman testified there was no indication from the MRI that these results predated the July 23, 2012, accident, but he indicated chronic meant the results had been there for a while.

Claimant demonstrated severe range of motion restrictions and had severe weakness and grating with repetitive passive circumrotation of the left shoulder. Dr. Zimmerman opined claimant sustained injury affecting the left shoulder while carrying out work duties for Blue River. His diagnosis was left shoulder rotator cuff tear, superimposed, and osteoarthritis. He noted claimant's arthritic problems predated the accident. Dr. Zimmerman opined the prevailing factor of the left shoulder rotator cuff tear is the accident on July 23, 2012.

Dr. Zimmerman assigned a 33 percent permanent partial impairment to the left upper extremity at the shoulder for permanent residuals of the left rotator cuff tear. Using table 3 of the *AMA Guides*, 4th edition, Dr. Zimmerman converted this impairment to a 20 percent whole person impairment. Dr. Zimmerman found no impairment from the accident beyond the shoulder capsule. This rating did not include any portion for preexisting disability impairment. He testified he would not attribute any of the assigned impairment to the preexisting arthritis as, with what he had available to him, there was no history of symptoms in the left shoulder.

Dr. Zimmerman felt claimant was stable and in no further need of diagnostic or therapeutic intervention, except for the possibility of shoulder replacement. Claimant was found to be at maximum medical improvement. Dr. Zimmerman opined the potential need for the left shoulder reverse total joint replacement is the consequence of the trauma sustained on July 23, 2012, which permanently aggravated and accelerated osteoarthritic changes within the left shoulder joint.

Restrictions were assigned for the left upper extremity, including occasional lifting up to 10 pounds and 5 pounds frequently, totally avoid work activity at shoulder height or above on the left side as such activity would be likely to increase pain and discomfort affecting the left shoulder, avoid frequent flexion, extension, twisting, torquing, pushing,

pulling, hammering, holding and reaching activities using the left upper extremity as such activities would be likely to increase pain and discomfort affecting the left shoulder.

Dr. Zimmerman opined claimant's pain and discomfort could be treated with Tramadol, aspirin, Tylenol, or an over-the-counter nonsteroidal anti-inflammatory medication. He recommended claimant's Lortab be discontinued as soon as possible to avoid the risk of addiction or habituation in the long term use of a narcotic for chronic musculoskeletal pain complaints. He also opined pain and discomfort could be treated with heat through hot baths, heating pads, or hot showers.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-511 states in part:

(a) . . .

(2)(A) The term "additional compensation" shall include and mean only the following: (i) Board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of \$25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident or injury, or unless a higher weekly value is proved; and (ii) employer-paid life insurance, disability insurance, health and accident insurance and employer contributions to pension and profit sharing plans.

. . .

(C) Additional compensation shall not be included in the calculation of average wage until and unless such additional compensation is discontinued. If such additional compensation is discontinued subsequent to a computation of average weekly wages under this section, there shall be a recomputation to include such discontinued additional compensation.

(3) The term "wage" shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury arising out of and in the course of such employment.

(b)(1) Unless otherwise provided, the employee's average weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be the wages the employee earned during the calendar weeks employed by the employer, up to 26 calendar weeks immediately preceding the date of the injury, divided by the number of calendar weeks the employee actually worked, or by 26 as the case may be.

The dispute over claimant's average weekly wage centers on whether the value of claimant's rent should be included in the calculation. Claimant originally had a written agreement with his former employer, INK, that included free rent so long as claimant was employed as a maintenance worker for that employer. However, when the Englewood Apartments went into bankruptcy the relationship between claimant and INK ended and a new employment relationship was created between claimant and respondent. Claimant

alleges the free rent stipulation continued with the new employer but has no documentation to support his claim. Additionally, Mr. Jones, the owner of Blue River, denies that free rent was part of the agreement. Claimant was paid an hourly wage for work performed and no more. The ALJ found the rent was not included in claimant's compensation package with respondent and the Board agrees with that finding. Claimant has failed to prove the value of the rent was part of his compensation package with respondent. As such, claimant's average weekly wage is limited to the stipulated \$201.25 per week. The Award of the ALJ is affirmed on this issue. This finding also decides the issue dealing with claimant's entitlement to TTD.

K.S.A. 2012 Supp. 44-501(e) states:

(e) An award of compensation for permanent partial impairment, work disability, or permanent total disability shall be reduced by the amount of functional impairment determined to be preexisting. Any such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.

(1) Where workers compensation benefits have previously been awarded through settlement or judicial or administrative determination in Kansas, the percentage basis of the prior settlement or award shall conclusively establish the amount of functional impairment determined to be preexisting. Where workers compensation benefits have not previously been awarded through settlement or judicial or administrative determination in Kansas, the amount of preexisting functional impairment shall be established by competent evidence.

(2) In all cases, the applicable reduction shall be calculated as follows:

(A) If the preexisting impairment is the result of injury sustained while working for the employer against whom workers compensation benefits are currently being sought, any award of compensation shall be reduced by the current dollar value attributable under the workers compensation act to the percentage of functional impairment determined to be preexisting. The "current dollar value" shall be calculated by multiplying the percentage of preexisting impairment by the compensation rate in effect on the date of the accident or injury against which the reduction will be applied.

(B) In all other cases, the employer against whom benefits are currently being sought shall be entitled to a credit for the percentage of preexisting impairment.

K.S.A. 2012 Supp. 44-501b states in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2012 Supp. 44-508(f)(1)(B) states:

(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

Claimant suffered significant injury to his left shoulder from the accident on July 23, 2012. However, claimant also had significant preexisting problems in that shoulder as well. All three doctors who examined claimant noted the existence of at least a partial tear in the rotator cuff along with preexisting degeneration. Dr. Jones and Dr. Zimmerman differ regarding the extent of the preexisting degeneration. Dr. Zimmerman found claimant's permanent impairment from the accident to be much more extensive than did Dr. Jones. However, Dr. Jones had the benefit of seeing the damage, both recent and long standing while performing the March 15, 2013, arthroscopic repair of the shoulder. Additionally, Dr. Jones, as the treating physician, observed claimant over a several month period. The Board finds the opinion of Dr. Jones to be the most persuasive in this instance.

K.S.A. 2012 Supp. 44-510d(b)(23) states:

(23) Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

K.S.A. 2012 Supp. 44-510d(c)(d) states:

(c) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i, and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total

period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

(d) The amount of compensation for permanent partial disability under this section shall be determined by multiplying the payment rate by the weeks payable. As used in this section:

(1) Payment rate shall be the lesser of (A) the amount determined by multiplying the average weekly wage of the worker prior to such injury by 66⅔% or (B) the maximum provided in K.S.A. 44-510c, and amendments thereto;

(2) weeks payable shall be determined as follows: (A) Determine the weeks of benefits provided for the injury on schedule; (B) determine the weeks of temporary compensation paid by adding the amounts of temporary total and temporary partial disability compensation paid and dividing the sum by the payment rate above; (C) subtract the weeks of temporary compensation calculated in (d)(2)(B) from the weeks of benefits provided for the injury as determined in (d)(2)(A); (D) multiply the weeks as determined in (d)(2)(C) by the percentage of permanent partial impairment of function as determined under subsection (b)(23).

The resulting award shall be paid for the number of weeks at the payment rate until fully paid or modified. Under no circumstances shall the period of permanent partial disability run concurrently with the period of temporary total or temporary partial disability.

Claimant has suffered an additional 10 percent functional disability to his left shoulder as the result of the injuries suffered on July 23, 2012, while working for respondent. The Award of the ALJ on this issue is affirmed.

K.S.A. 2012 Supp. 44-510h(e) states:

(e) It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

The Award grants claimant future medical treatment to include pain management and medication management. The Board affirms the Award of the ALJ in this regard. The Board finds the Award of the ALJ should be modified to incorporate the stipulated average

weekly wage, exclusive of the claimed rental amount, but affirmed in all other regards.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to incorporate the stipulated average weekly wage but otherwise affirmed. Claimant has suffered a 10 percent permanent partial functional disability to his left shoulder as the result of the accident on July 23, 2012. Claimant's award is based upon an average weekly wage of \$201.25 per week, resulting in a weekly benefit of \$134.17, with future medical treatment to include pain management and medication management.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated August 12, 2014, is modified to incorporate the stipulated average weekly wage, but affirmed in all other regards.

Claimant is entitled to 43.00 weeks of temporary total disability compensation at the rate of \$134.17 per week on the amount of \$5,769.31, followed by 18.20 weeks of permanent partial functional disability compensation at the rate of \$134.17, in the amount of \$2,441.89, for a total award of \$8,211.20, all of which is due and owing and ordered paid in one lump sum, minus amounts previously paid. In all other regards the Award of the ALJ is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
debbie@fincherlawoffice.com
tammy@fincherlawoffice.com
roger@fincherlawoffice.com

Michael T. Halloran, Attorney for Respondent and its Insurance Carrier
mhalloran@mthlaw.com

Rebecca Sanders, Administrative Law Judge